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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE,

Petitioner,

v.

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the decision of the United States Court of Appeals for the Seventh Circuit directly conflicts with this Court's recent decision in *United States* v. *Timmreck*.

II.

Whether the Court of Appeals acted incorrectly in retroactively applying its prior decision in *United States ex rel. Baker* v. *Finkbeiner* to the instant case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI 8

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES* v. *TIMMRECK* 8

II. THE COURT OF APPEALS' DECISION IN *UNITED STATES EX REL. BAKER* v. *FINKBEINER* SHOULD NOT BE APPLIED RETROACTIVELY 11

CONCLUSION 18
APPENDIX
United States ex rel. Williams v. *Morris*, 633 F. 2d 71 (7th Cir. 1980) 1a

TABLE OF AUTHORITIES

PAGE

CASES:

Bachner v. *United States*, 517 F. 2d 589 (7th Cir. 1975) 9, 10, 15

Bailey v. *Holley*, 530 F. 2d 169 (7th Cir. 1976) 13

Boykin v. *Alabama*, 395 U. S. 238 (1969) 12, 14, 15

Halliday v. *United States*, 394 U. S. 831 (1969) 14, 16

McCarthy v. *United States*, 394 U. S. 459 (1969) ... 16

People v. *Irons*, 54 Ill. App. 3d 50, 369 N. E. 2d 558 (5th Dist. 1977) 15, 16

People v. *Krantz*, 58 Ill. 2d 187, 317 N. E. 2d 559 (1973) 15

People v. *Wills*, 61 Ill. 2d 105, 330 N. E. 2d 505 (1975) 11, 12, 13, 15, 16

Robinson v. *Neil*, 409 U. S. 505 (1971) 13

Stovall v. *Denno*, 388 U. S. 293 (1967) 14

Timmreck v. *United States*, 577 F. 2d 372 (6th Cir. 1978) 9

Timmreck v. *United States*, 423 F. Supp. 537 (E. D. Mich. 1976) 9

United States ex rel. Baker v. *Finkbeiner*, 551 F. 2d 180 (7th Cir. 1977) 10, 11, 13, 14, 15, 16, 17

United States ex rel. Flowers v. *Illinois Parole and Pardon Board*, No. 78 C 1000 (N. D. Ill.) 16

United States ex rel. Hughes v. *Rundle*, 419 F. 2d 116 (3rd Cir. 1969) 15

United States ex rel. Williams v. *Morris*, 633 F. 2d 71 (7th Cir. 1980) 1, 14

United States ex rel. Williams v. *Morris*, 594 F. 2d 614 (7th Cir. 1979) 2

	PAGE
United States ex rel. Williams v. *Morris*, 483 F. Supp. 775 (N. D. Ill. 1980) (*Williams II*)	1, 2
United States ex rel. Williams v. *Morris*, 447 F. Supp. 95 (N.D. Ill. 1978) (*Williams I*)	2, 5, 10, 17
United States v. *Timmreck*, 441 U. S. 780 (1979)	8, 9, 10, 11
Williams v. *United States*, 401 U. S. 646 (1971)	13
STATUTES:	
21 U. S. C. § 841(b)(1)(A)	8
28 U. S. C. § 1254(1)	2
28 U. S. C. § 2101(c)	2
28 U. S. C. § 2254	7, 10
28 U. S. C. § 2255	8, 10
Ill. Rev. Stat., 1975, ch. 38, § 19-1	4, 6
Ill. Rev. Stat., 1975, ch. 38, § 1005-8-1(b)(3)	4, 6
Ill. Rev. Stat., 1975, ch. 38, § 1005-8-1(c)(3)	4, 6
Ill. Rev. Stat., 1973, ch. 38, § 1005-8-1(e)	3, 12
Ill. Rev. Stat., 1975, ch. 38, § 1005-8-1(e)(2)	4, 6
Ill. Rev. Stat., 1975, ch. 110A, § 402	12, 15
Ill. Rev. Stat., 1977, ch. 38, § 1005-8-1	5
MISCELLANEOUS:	
Fed. Rules Crim. Proc. Rule 11	8, 9
Ill. Ann. Stat. ch. 110A, § 402 (Smith-Hurd) (Committee Comments)	12
Supreme Court Rule 17(1)(a)	17
Supreme Court Rule 17(1)(c)	11
Supreme Court Rule 21.1(b)	1

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OCTOBER TERM, 1980

GAYLE FRANZEN,

Petitioner,

v.

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This Petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit as it pertains to respondents Lawrence Williams and Oscar Southall. *United States ex rel. Williams* v. *Morris,* 633 F. 2d 71 (7th Cir. 1980). The Court of Appeals' decision affirmed in part and reversed in part the decision and judgment of the United States District Court, Northern District of Illinois, Eastern Division, which granted respondents' applications for Writs of Habeas Corpus.[1] *United States* ex. rel. *Williams* v. *Morris,* 483 F. Supp. 775 (N. D. Ill. 1980).

[1] Since the Court of Appeals ruled in favor of Petitioner with regard to a third individual (*i.e.*, Emanuel Williams), review is not sought as the decision pertains to him. *See* Supreme Court Rule 21.1(b).

As noted in the Court of Appeals' decision, the Petitions for Writs of Habeas Corpus had been consolidated in the District Court, which originally ruled in favor of the respondents in 1978. The District Court's ruling was based upon a finding that respondents' fourteenth amendment due process rights were violated by the failure to inform them of a three year mandatory parole term which would automatically attach to the penitentiary sentences respondents received as part of negotiated plea agreements. *United States ex rel. Williams* v. *Morris,* 447 F. Supp. 95 (N. D. Ill. 1978) (hereinafter referred to as "*Williams I*"). Subsequently, however, the Court of Appeals reversed that decision, holding that respondents had failed to exhaust an available state court remedy. *United States ex rel. Williams* v. *Morris,* 594 F. 2d 614 (7th Cir. 1979).

Upon remand to the District Court, respondents renewed their requests for expungement of their mandatory parole terms, contending that an intervening Illinois Supreme Court decision conclusively demonstrated that resort to the state courts was futile. The District Court agreed and, for the reasons set forth in *Williams I,* granted the relief sought. *United States ex rel. Williams* v. *Morris* 483 F. Supp. 776 (N. D. Ill. 1980) (hereinafter referred to as "*Williams II*"). It is from the Court of Appeals' decision in *Williams II* that the petitioner now seeks a Writ of Certiorari.

JURISDICTION

The Court of Appeals' decision was rendered on October 22, 1980. No Petition for Rehearing was filed in that Court. This Petition is being filed within 90 days of the date of the Court of Appeals' decision as per 28 U. S. C. § 2101(c). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

Ill. Rev. Stat., 1973, ch. 38, § 1005-8-1(e) provides that:

> Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:
>
> (1) for murder or a Class 1 felony, 5 years;
>
> (2) for a Class 2 felony, or a Class 3 felony, 3 years;
>
> (3) for a Class 4 felony, 2 years.

STATEMENT OF THE CASE

The factual situations in each of the two cases are set forth below according to the names of each of the respondents involved.

LAWRENCE WILLIAMS

On March 11, 1975, respondent Lawrence Williams pled guilty in the Circuit Court of Cook County, Illinois (No. 74-3339) to a single charge of burglary. At that time, burglary carried a penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement between Williams' public defender and the prosecutor, Williams was to receive an indeterminate sentence of from one to two years in prison. The trial judge was a party to the conference at which the plea agreement was finally struck. (L. Williams, R. 6, Ex. A, pp. 2 and 3).[2]

Before accepting the plea, the trial judge admonished the defendant of the consequences of his plea. (L. Williams, R. 6, Ex. A, pp. 3-14). He had the prosecutor repeat the terms of the plea bargain in open court and elicited Williams' understanding and acceptance of its terms. (L. Williams, R. 6, Ex. A, p. 4). The trial judge also indicated that, pursuant to the plea agreement, the court had agreed to accept the sentencing recommendation of the State, conditioned upon the truth of the

[2] The various documents constituting the records on appeal in the Seventh Circuit have been marked in each case by the District Court clerk. Unless the Appendix used in the Court of Appeals is being referred to, the designation (Name, R. ____, Ex. ____, p. ____) will be used throughout this brief to designate the case, document number, and page of the document referred to. References to the Appendix will be in the following manner. (A. ____).

factual information supplied to the court concerning the defendant. (L. Williams, R. 6, Exhibit A, p. 5). The transcript contains no statement by the court, the prosecutor or the public defender that the recommended sentence included a mandatory parole term.

The judge then received Williams' acknowledgment that he understood the nature of the charges and understood his constitutional rights to remain silent, to be tried before a jury, to be proven guilty beyond a reasonable doubt, and to confront and cross-examine witnesses. (L. Williams, R. 6, Ex. A, pp. 5-10). A factual basis for the plea was established and Williams indicated that he understood that by pleading guilty he admitted those facts. (L. Williams, R. 6, Ex. A, pp. 10-11). The trial judge then described the potential statutory penalty for the charged offense, omitting any mention of a mandatory parole term. (L. Williams, R. 6, Exhibit A, pp. 12-13). After hearing evidence in aggravation and mitigation, the trial court sentenced Williams to not less than one nor more than two years in prison.

Lawrence Williams was imprisoned until May 20, 1976, when he was released on parole having served approximately seventeen months in prison. Williams stated in his Petition for Writ of Habeas Corpus that he was unaware that a mandatory parole term attached to his sentence until approximately two months prior to his discharge. (L. Williams, R. 1, p. 4). While serving his three year mandatory parole term, respondent was arrested and subsequently found to be a parole violator. Williams had been reincarcerated at Stateville Correctional Center, Joliet, Illinois, when the original Writ of Habeas Corpus was issued. *See Williams I*, 447 F. Supp. 95. Before the denial of a Motion to Reconsider in *Williams I* took effect, the respondent was released on six months mandatory release on February 1, 1978, pursuant to *Ill. Rev. Stat.*, 1977, ch. 38, §1005-8-1. This revised law also had the effect of reducing Williams' parole term from three to two years. Williams'

period of mandatory release expired on August 1, 1978, at which time he was released from the custody of the Illinois Department of Corrections. In sum, respondent served approximately twenty-eight months in prison.

OSCAR SOUTHALL

On March 19, 1975, respondent Southall, like respondent Williams, pled guilty in the Circuit Court of Cook County, Illinois (No. 75-228) to one count of burglary. At that time, burglary carried the same penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Pursuant to a plea agreement between Southall's public defender and the prosecutor, Southall was to receive an indeterminate sentence of from one to three years. This agreement was reached at a conference in which the trial judge was present and had indicated that he would sentence the defendant to one to three years. (O. Southall, R. 6, Ex. A, pp. 2, 5, 6).

The transcript reveals that neither the trial judge nor the attorneys disclosed the existence of the mandatory parole term during their discussion of either the plea agreement or the possible sentence which could be imposed.

The trial judge explained to Southall that by pleading guilty he waived his constitutional rights to a trial by jury and to confront and cross-examine witnesses. (O. Southall, R. 6, Ex. A, p. 4). The judge received Southall's acceptance and acknowledgment of these consequences. (O. Southall, R. 6, Ex. A, p. 4). Southall responded negatively to the question of whether his guilty plea had been induced by force, duress, threats or promised rewards. (O. Southall, R. 6, Ex. A, p. 4). The judge next described his conversation with Judge Strzalka, who had previously placed Southall on two years probation in May, 1974, for an earlier offense. After being advised of the

pending charge and the plea negotiations, Judge Strzalka reportedly stated that if Southall pled guilty to the burglary charge, he (Judge Strzalka) would either find a violation of probation and impose a concurrent sentence for the same term, or would order the probation revoked and terminated as unsatisafctory. (O. Southall, R. 6, Ex. A, pp. 5, 6). (At the probation hearing on June 10, 1976, Judge Strzalka took the second option and terminated Southall's probation as unsatisfactory.)

At this time, the trial judge stated that as a result of a pretrial conference, the court would impose the sentence which had been discussed. (O. Southall, R. 6, Ex. A, p. 6). Finally, after establishing a sufficient factual basis for the plea, the trial court accepted the guilty plea and sentenced Southall to an indeterminate term of one to three years in prison. (O. Southall, R. 6, Ex. A, pp. 7-9).

Southall was imprisoned until September 22, 1975, when he completed his prison sentence (less time off for good behavior) and was released on parole having served approximately eleven months in prison. He was declared a parole violator on October 8, 1976, and was reincarcerated pursuant to the three year mandatory parole provisions implicit in his original sentence. Respondent Southall was subsequently reparoled and discharged from the custody of the Illinois Department of Corrections as of October 24, 1979. He had served approximately twenty-three months in prison.

As previously noted, both Williams and Southall subsequently filed Petitions for Writs of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court, Northern District of Illinois, Eastern Division.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES* v. *TIMMRECK*.

This Court, in its recent decision in *United States* v. *Timmreck*, 441 U.S. 780 (1979), ruled that a federal offender may not receive collateral relief from a guilty plea based upon a failure to advise him of the mandatory special parole term required by 21 U. S. C. § 841(b)(1)(A). In *Timmreck*, the defendant, acting on advice of counsel, pled guilty to a charge of conspiracy to distribute various controlled substances. As required by Fed. Rules Crim. Proc. Rule 11, the District Judge formally addressed the defendant and determined that there was a factual basis for the plea and that he was acting voluntarily. The judge admonished the defendant that he could receive a sentence of up to 15 years imprisonment and a $25,000 fine; however, he failed to advise the defendant of the mandatory special parole term of at least three years.

The District Judge accepted the guilty plea and, at a later proceeding, sentenced the defendant to 10 years imprisonment, plus a mandatory special parole term of 5 years, and a fine of $15,000. Pursuant to a plea bargain with the prosecutor, other charges against the defendant were dismissed. No objection to the sentence was raised at that time and the defendant did not take a direct appeal from his conviction.

Approximately two years later, the defendant moved to vacate the sentence pursuant to 28 U. S. C. § 2255 on the ground that the trial judge had violated Rule 11 by accepting his plea without informing him of the mandatory special parole term. Following an evidentiary hearing, the District Court

denied Timmreck's motion. *Timmreck* v. *United States,* 423 F. Supp. 537 (E. D. Mich. 1976). The District Court recognized that a violation of Rule 11 had occurred but, relying heavily on Judge (now Justice) Stevens' concurrence in *Bachner* v. *United States,* 517 F. 2d 589 (7th Cir. 1975), concluded that collateral relief was not justified since the defendant had received a sentence within the maximum described to him at the time the guilty plea was accepted and thus he had not suffered any prejudice. 423 F. Supp. at 539-540.

The Sixth Circuit Court of Appeals reversed. *Timmreck* v. *United States,* 577 F. 2d 372 (6th Cir. 1978). That court held that a violation of Rule 11 will support a collateral attack on a guilty plea even where there is neither constitutional error nor any showing of prejudice to the defendant. *Id.* at 375-377.

As previously noted, this Court reversed the Sixth Circuit's decision in a unanimous opinion authored by Mr. Justice Stevens. The gist of this Court's holding was that a violation of Rule 11 is neither constitutional nor jurisdictional. Moreover, the opinion went on to state that:

> Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." [*Hill* v. *United States,* 368 U.S. 424, 428 (1962).] Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty.

United States v. *Timmreck,* 441 U.S. at 784.

Similarly, neither of the petitioners in the instant case has alleged that had he been properly advised of the mandatory parole term he would not have pled guilty. (L. Williams, R. 1, p. 4; 0. Southall, R. 4, p. 4). Additionally, the combined prison and parole terms given to each respondent are within the maximum penalty which could have been assessed and the record reflects the respondents' awareness of this fact. *See*

Williams I, 447 F. Supp. at 100, 101. Indeed, even allowing for the time served upon reincarceration, respondent Southall was actually required to serve only twenty-three months of actual imprisonment as opposed to the maximum three year sentence which he was given by the trial court. (O. Southall, R. 6, Ex. A, pp. 2, 10)[3]

Petitioner is of course, aware of the fact that *Timmreck* was decided pursuant to federal statutory law (*i.e.*, 28 U.S.C. § 2255), while the decision in the instant case was grounded upon constitutional law. However, if the federal courts are not to grant collateral relief under § 2255, it stands to reason that they should refrain from imposing constitutional standards upon the states pursuant to 28 U.S.C. § 2254 where the issue in question is identical.

As Mr. Justice Stevens has noted:

> . . . the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> " 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.' "

United States v. *Timmreck, Id.* (Citation omitted).

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[3] Respondent Williams actually served approximately twenty-eight months in prison or only four months more than the maximum sentence which he was given. At least in Southall's situation it may well be that the Court of Appeals erred in applying the rule enunciated in *United States ex rel. Baker* v. *Finkbeiner*, 551 F.2d 180 (7th Cir. 1977), rather than that contained in *Bachner* v. *United States*, 517 F.2d 589, 597 (7th Cir. 1975).

It is, therefore, submitted that certiorari should be granted so that this Court can correct the Court of Appeals' failure to properly apply the holding of *United States* v. *Timmreck, supra,* to the instant Petitions. *See* Supreme Court Rule 17(1)(c). Moreover, it is submitted that using the *Timmreck* guidelines, neither of the respondents herein is entitled to federal habeas corpus relief.

II.

THE COURT OF APPEALS' DECISION IN *UNITED STATES ex rel. BAKER* V. *FINKBEINER* SHOULD NOT BE APPLIED RETROACTIVELY.

In *United States ex rel. Baker* v. *Finkbeiner,* 551 F.2d 180 (7th Cir. 1977), the Court of Appeals held that where a felony defendant is not informed of a mandatory parole term at the time he enters a guilty plea, the plea is "unfairly induced in violation of the Due Process Clause." *Id.* at 184. The opinion in that case went on to state that:

> [t]he difference between the three or four years in custody he [*i.e.,* the petitioner] did receive and the one to two years in custody he was told he would receive is substantial enough to justify a finding that he was unfairly compelled to accept the detrimental elements of his bargain without realizing its benefits. *Id.*

The Court of Appeals proceeded to release Baker from custody, reasoning that he had performed his part of the plea bargain (*i.e.,* imprisonment of up to two years) and the State, having had custody of Baker for some thirty-two months, must therefore perform its side of the bargain. *Id.*

Petitioner herein submits that the decision in *Baker* should be given prospective application only and should not have been applied to the instant guilty pleas which were entered long before *Baker* was decided or even the related Illinois Supreme Court case of *People* v. *Wills,* 61 Ill.2d 105, 330 N.E.2d 505 (1975).

A.

Wills Set Forth A New Rule Of Procedure—_Baker_ Raised It To A Constitutional Level.

The State of Illinois adopted, in 1970, Supreme Court Rule 402 (*Ill. Rev. Stat.*, 1975, ch. 110A, § 402) which governs the procedure by which a plea of guilty is accepted in the state courts. Rule 402 requires that before any defendant may plead guilty to a charge he must be admonished of the constitutional rights which he waives by such a plea. As the Committee Comments to the rule make clear, this requirement was instituted to assure compliance with the decision of *Boykin* v. *Alabama*, 395 U.S. 238 (1968). Ill. Ann. Stat. ch. 110A, § 402 (Smith-Hurd) (Committee Comments).

Rule 402 has served its purpose, providing clear, on the record evidence of the knowing and voluntary nature of thousands of guilty pleas. Then, on January 1, 1973, the Illinois Mandatory Parole Act [*Ill. Rev. Stat.*, 1973, ch. 38, § 1005-8-1(e)] took effect, imposing terms of parole on all persons convicted of a felony, whether they were convicted at trial or by virtue of their own plea. Soon, several Illinois courts began receiving challenges similar to those involved in the case at bar, as the Illinois courts began to face the problem of whether Rule 402 admonitions were sufficient to assure the knowing and voluntary nature of a guilty plea. These challenges were squarely met and answered by the Illinois Supreme Court in its opinion in *People* v. *Wills, supra.*

In *Wills*, the Illinois Supreme Court reversed a lower court opinion holding the Mandatory Parole Act unconstitutional. The Court recognized that the Act may, in certain circumstances, be susceptible of unconstitutional application, but ruled that the law on its face was nevertheless valid. 330 N.E.2d at 507-8. In a supplemental opinion, the Court declined to rule that the absence of admonitions about mandatory parole would render a guilty plea invalid *per se*, and instead held that each

case should be judged on its own facts. However, to prevent further confusion among the Illinois trial courts, the Supreme Court ruled that from that date (*i.e.*, May 19, 1975) forward, admonitions must directly discuss mandatory parole. 330 N.E.2d at 508-9. This ruling was made in light of Petitions for Rehearing filed by both the State and the defendant which discussed the question of retroactivity. *Wills* thus set forth a new rule of criminal procedure designed to provide greater protection for future defendants.

Subsequently, however, in *United States ex rel. Baker* v. *Finkbeiner, supra,* decided on March 17, 1977, the Court of Appeals for the Seventh Circuit held that a failure to admonish a defendant concerning the mandatory parole term had the effect of rendering a guilty plea involuntary—in violation of the due process clause of the fourteenth amendment. In so holding, *Baker* reaffirmed the new rule of procedure announced in *Wills* but, in addition, raised it to constitutional status.

B.

Only Procedures Which Affect The Integrity Of The Fact-Finding Process Should Automatically Be Applied Retroactively.

Where a new rule of procedure has been established, this Court has provided full retroactivity, as a threshold matter, in situations where: 1) the new rule remedies a significant or a substantial defect in the fact-finding process at trial, a defect which raises serious questions about the accuracy of guilty verdicts in past trials, *Williams* v. *United States,* 401 U.S. 646, 653 (1971); *Bailey* v. *Holley,* 530 F.2d 169, 172 (7th Cir. 1976); and 2) where the new rule accords constitutional immunity to conduct which had previously been penalized. *Robinson* v. *Neil,* 409 U.S. 505, 509 (1971). Only the first situation is potentially applicable here.

Petitioner submits that the procedure by which a mandatory parole admonishment is, or is supposed to be, given, bears no relationship to the integrity of the fact-finding process of a criminal trial. As the rule announced in *Baker* concerns only the procedure in the guilty plea proceedings, it need not receive automatic retroactive application under the above-mentioned standard.

C.

Baker Should Not Be Applied Retroactively Under The Criteria Guiding Such An Application.

Assuming *Baker* is not entitled to automatic retroactive application, the next step which this Court must take to determine whether the decision should be applied retroactively involves a balancing process. This Court, in an opinion which, coincidently, held that new rules governing guilty pleas in federal courts should only be applied prospectively, described the criteria guiding resolution of the retroactivity question as involving: 1) the purpose of the new rule; 2) the extent of reliance upon the old rule; and 3) the effect retroactive application would have upon the administration of justice. *Halliday* v. *United States*, 394 U.S. 831, 832 (1968); *See Stoval* v. *Denno*, 388 U.S. 293, 297 (1967).

With respect to the first of these three criteria, it is clear that the main purpose of *Baker* is designed to assure that judges give on-the-record admonitions to defendants who plead guilty pursuant to a plea bargain, emphasizing the effect that the mandatory parole term has on their sentence. In holding that the lack of such an admonishment constituted a violation of due process, the District Court cited the case of *Boykin* v. *Alabama*, 395 U.S. 238 (1969).[4] *Boykin* provided that it was reversible

[4] The Court of Appeals, agreeing with both the reasoning and conclusion of the District Court on this issue, adopted that Court's opinion as its own. *United States ex rel. Williams* v. *Morris*, 633 F.2d at 77.

error for a trial court to accept a guilty plea without an affirmative showing, on-the-record, that the plea was made intelligently and voluntarily. *Boykin* has not been applied retroactively. *United States ex rel. Hughes* v. *Rundle*, 419 F.2d 116 (3rd Cir. 1969). Neither should *Baker*.

As for the second factor, Illinois trial courts quite properly relied upon Illinois Supreme Court Rule 402 as the complete standard which had to be met in accepting guilty pleas. These courts had been accepting guilty pleas with the justifiable belief that the Constitution was satisfied once a defendant was told of the constitutional rights he waived by pleading guilty. *Compare Boykin* v. *Alabama with Ill. Rev. Stat.* 1975, ch. 110A, § 402. No case law existed which would have foretold the result in *Baker*. No Illinois Supreme Court case prior to *Wills* dealt with the specific due process implications of mandatory parole. The first time the Illinois trial courts would have become aware of the requirement that defendants *must* be admonished concerning the mandatory parole term would have been on May 19, 1975, when the Illinois Supreme Court handed down its opinion in *Wills*.[5] There, the Court made clear its command that from that date forward full admonitions must be given, but specifically recognized, as this Court must as well, that there was a great deal of justified reliance upon Supreme Court Rule 402 throughout the Circuit Courts of Illinois and that the extent of this reliance weighed heavily against any attempt to fashion a retroactive rule governing past proceedings. 330 N.E.2d at 508-509; *See also People* v. *Irons*, 54 Ill. App. 3d 50, 369

[5] In particular, it must be noted that the Illinois Supreme Court, prior to *Wills*, had indicated that an admonishment as to the mandatory parole term need not be given to a defendant who wished to plead guilty. *People* v. *Krantz*, 58 Ill. 2d 187, 195, 317 N.E.2d 559 (1974). Illinois trial courts certainly were entitled to rely upon *Krantz* since it appeared to be "on all fours" regarding the question of admonishment as to the mandatory parole term.

Among the federal courts, no Seventh Circuit cases intimated that the rule in *Baker* was coming; indeed, if anything, the case law would have given the impression that the *Baker* case would be decided the other way. *Cf. Bachner* v. *United States, supra.*

N.E.2d 558, 560 (5th Dist. 1977). The interests of justice require that similar considerations should govern the effect to be given the *Baker* decision.

Finally, the effect a retroactive application would have on the administration of justice would be devastating since every felony plea accepted since the enactment of the mandatory parole term until March 17, 1977, could be questioned. *See Halliday* v. *United States,* 394 U.S. 831 (1968) [giving *McCarthy* v. *United States,* 394 U.S. 459 (1969), prospective application only].

The mandatory parole concept discussed in *Baker* took effect across the State of Illinois on January 1, 1973. On May 19, 1975, the Illinois Supreme Court's *Wills* opinion first set forth the requirement that admonitions must be given regarding the parole term. Therefore, if *Baker* were only to be given retroactive effect to those cases arising prior to the *Wills* decision, it could potentially apply to *all* negotiated felony guilty pleas entered throughout Illinois during 1973, 1974 and the first 20 weeks of 1975.[6] Illinois Courts' Administrative Office Statistics for one of these years, 1974, shows that 13,571 persons were convicted of felonies in Illinois. Of that number, over 90%, or 12,370 convictions, were obtained following a plea of guilty. This would mean that within that period, all prisoners whose pleas did not comport with *Baker's* guidelines could collaterally attack their convictions, unless the State moves quickly to void their mandatory parole terms—an act which is hardly conducive to promoting the legitimate public policy ends that the statute protects.

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[6] Since the Court of Appeals chose to make *Baker* fully retroactive, all felony guilty pleas entered between January 1, 1973 and March 17, 1977 (the day *Baker* was decided), are now open to collateral attack. Indeed, a class has already been certified in the pending case of *United States ex rel. Flowers* v. *Illinois Pardon & Parole Board,* No. 78 C 1000 (N.D. Ill.)

The other alternative, suggested by the District Court, is for the State to procure the transcript of the guilty plea in a given case, determine the terms of that plea, and adhere to those terms accordingly. *Williams I*, 447 F. Supp. at 107-108. The District Court, in so suggesting, assumes that there is a readily available state court transcript, from which the exact terms of the plea can be discerned.

There are two problems with this. A defendant who pleads guilty is not likely to have appealed his conviction; for example, neither of the respondents in the instant case has done so. Thus, in order to obtain the transcript in each case, the state must go to the clerk of each court in which the plea was accepted and order the plea proceedings to be transcribed. (It is not the custom to automatically transcribe such proceedings at the time guilty pleas occur, unless an appeal is sought.) Furthermore, once the transcript is found, the reviewing court must strictly scrutinize the nature of each admonishment given in *every* plea of guilty, to determine the sufficiency of the admonishment.

While respondents do not argue that the federal courts should not act on constitutional issues, this Court is urged to give recognition to the fact that the highest court in Illinois was squarely faced with the retroactivity issue in May of 1975, and that it found, using the same criteria that this Court must use, that the extent of reliance by the Illinois trial courts, and the burden which would face the judicial system, was too great to afford retroactive application of the rule requiring that defendants be warned of the mandatory parole term.

Given the foregoing considerations, it is respectfully submitted that certiorari be granted so as to allow this Court to review the Court of Appeals' erroneous and unjustified decision to apply its prior decision in *United States ex rel. Baker* v. *Finkbeiner, supra,* retroactively to the case at bar. *See* Supreme Court Rule I 17(1)(a).

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse that portion of the Court of Appeals' decision which granted habeas corpus relief to the respondents.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1296

UNITED STATES OF AMERICA ex rel. LAWRENCE WILLIAMS, OSCAR SOUTHALL and EMANUEL WILLIAMS,

Petitioners-Appellees,

v.

ERNEST MORRIS, Warden, Stateville Correctional Center; THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center; and PEOPLE OF THE STATE OF ILLINOIS,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 2402, 77 C 2184 and 77 C 1937—**Prentice H. Marshall**, *Judge.*

ARGUED SEPTEMBER 16, 1980—DECIDED OCTOBER 22, 1980

Before CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Petitioners, who pleaded guilty in their state court criminal prosecutions, sought writs of habeas corpus claiming that state judges violated petitioners' Fourteenth Amendment rights by failing to inform them that a mandatory three-year parole term would automatically attach to the sentences they were promised under plea agreements. The petitions were consolidated below, and District Judge Prentice Marshall, finding *United States* ex rel. *Baker v.*

Finkbeiner, 551 F.2d 180 (7th Cir. 1977), controlling, held that petitioners were entitled to relief. 447 F. Supp. 95 (N.D. Ill. 1978) (*Williams I*).

On appeal, this Court reversed, holding that petitioners had failed to exhaust an available state court remedy. 594 F.2d 614 (7th Cir. 1979).[1] Petitioners thereafter renewed their requests for expungement of their mandatory parole terms, contending that a subsequent Illinois Supreme Court decision showed conclusively that no state court remedy was available. Judge Marshall agreed and for the reasons set forth in *Williams I* granted the relief sought. 483 F. Supp. 776 (N.D. Ill. 1980) (*Williams II*). The State appeals on the merits.[2] We affirm in part and reverse in part.

I

Lawrence Williams

Petitioner Lawrence Williams pleaded guilty in the Circuit Court of Cook County on March 11, 1975, to a single charge of burglary, which at the time carried a penalty of one to twenty years imprisonment plus a mandatory three-year parole term. Ill. Rev. Stat. Ch. 38, §§ 119-1, 1105-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement reached by Williams' public defender and the prosecutor, Williams was to

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[1] We also held that the petitions were not moot by reason of the fact that two of the petitioners had completed their entire sentence periods including the added parole term and the other had been discharged in compliance with the order of the district court because there remained collateral consequences which might have lingering effects since all three petitioners were found guilty of parole violations. 594 F.2d at 615. See *Carafas v. LaVelle*, 391 U.S. 234, 238-240; *Sibron v. New York*, 292 U.S. 40, 50-58.

[2] The State does not agree with Judge Marshall's conclusion on the exhaustion question but does not raise it on appeal because "none of the petitioners are presently in the custody of the Illinois Department of Corrections * * * [and] are, therefore, precluded, by Illinois law, from filing a post-conviction petition" (Br. 12).

receive an indeterminate sentence of one to two years in prison.

Before accepting the guilty plea, the trial judge admonished Williams of its consequences, elicited Williams' understanding and acceptance of the terms of the plea agreement, and indicated that the court would accept the recommended sentence. The judge then received Williams' acknowledgement that he understood the nature of the charges and his constitutional rights. A factual basis for the plea was established, and Williams indicated that he understood that by pleading guilty he admitted those facts. After advising Williams of the statutory penalty of one to 20 years imprisonment and hearing evidence in aggravation and mitigation of the offense, the trial judge sentenced Williams to not less than one nor more than two years in prison. The transcript contains no statement by the court, the prosecutor or the public defender that the recommended and actual sentence included a mandatory three-year parole term. Nor does the mandatory parole term appear on the sentencing order.

Williams completed his sentence on May 20, 1976, and was at that time released on parole. Williams claimed to have been unaware of the mandatory parole term until two months prior to his discharge. While serving the parole term, Williams was arrested on March 16, 1977, charged as a parole violator. He was reincarcerated at Stateville Correctional Center in Joliet, Illinois, on this charge when the Writ of Habeas Corpus was issued in *Williams I*. Before the denial of the State's Motion to Reconsider in *Williams I* took effect, Williams was released on a six months "mandatory supervisory release term" on February 1, 1978, pursuant to Ill. Rev. Stat. Ch. 38, § 1005-8-1. This revised law also had the effect of reducing Williams' parole term from three to two years. The period of mandatory release expired on August 1, 1978, at which time Williams was released from the custody of the Illinois Department of Corrections. He had been in the custody of the state for three years and four and one-half months, including 28 months in prison.

Oscar Southall

Petitioner Oscar Southall pleaded guilty in the Circuit Court of Cook County on March 19, 1975, to a single charge of burglary carrying the same penalty of one to 20 years followed by three years of mandatory parole. Pursuant to the plea agreement reached by his public defender and the prosecutor and ratified by the court, Southall was to receive an indeterminate sentence of one to two years in prison. The proceeding at which the trial judge accepted Southall's plea and sentenced him to one to two years in prison does not differ significantly from the above-described proceeding involving Lawrence Williams. Again, the transcript contains no statement by the prosecutor, the public defender or the trial judge that the recommended and actual sentences included a mandatory three year parole term. Again, the sentencing order contains no reference to a mandatory parole term.

Southall completed his sentence and was released on parole on September 22, 1975. He was declared a parole violator on October 8, 1976, and reincarcerated. He was subsequently re-paroled and eventually discharged from the custody of the Illinois Department of Corrections on October 24, 1979. Southall had been in the custody of the state for approximately four years and seven months, including 23 months in prison.

Emanuel Williams

Petitioner Emanuel Williams' case involves two guilty pleas. The first was entered on July 31, 1974, in the Circuit Court of Cook County to a charge of burglary carrying a penalty of one to 20 years imprisonment plus three years mandatory parole. Williams was sentenced in accordance with the prosecution's recommendation to one to three years in prison.[3] There is no indication in the

[3] It is not clear from the transcript whether the recommended and actual sentences were made pursuant to a plea agreement or not. Judge Marshall initially found that the adequacy of the first guilty plea was not ripe for summary judgment.

(Footnote continued on following page)

transcript of the proceedings at which the plea was entered and Williams was sentenced that he was informed by his attorney, the prosecutor or the court that he would be subject to a mandatory parole term. There is no reference to a mandatory parole term in the sentencing order.

Two days later, on August 2, 1974, Williams entered a guilty plea in the same court to a charge of theft which, because it involved more than $150, carried a penalty of one to ten years imprisonment and a mandatory three-year parole term. The guilty plea was entered pursuant to an agreement between Williams' attorney and the prosecutor calling for a recommended sentence of one to three years in prison. The trial judge, who was not the same judge as in the July 31 proceeding, accepted the prosecution's recommendation in sentencing Williams, but did not participate in or ratify the plea agreement prior to accepting Williams' plea. The judge also warned Williams that a mandatory parole term was included in the maximum sentence for the charge to which Williams sought to plead guilty. He was not told that a mandatory parole term attached to the prison term negotiated by his attorney and the prosecution.

As a result of the two guilty pleas, Williams was imprisoned to serve concurrent sentences of one to three years. He was released on parole on August 23, 1976, but was returned to prison on December 10, 1976, for a parole violation. Williams was released again (on a $5,000 recognizance bond) following the decision in *Williams I*. His sentence, including the statutory parole term, expired on September 17, 1978. Williams had been in the custody of the state for approximately four years and four and one-half months, including 27 months in prison.

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[3] *continued*
447 F. Supp. at 105. Subsequently, he must have determined that the plea was made pursuant to a plea bargain because his order granted the relief sought with respect to this plea (State's Br. at A 7). In any event, the State does not challenge the order with respect to this plea on the basis of the factual record.

II

In *United States* ex rel. *Baker v. Finkbeiner, supra*, this Court held that the failure to inform a state criminal defendant of a mandatory parole term accompanying his negotiated prison sentence violated the Due Process Clause of the Fourteenth Amendment. Baker had pleaded guilty to two criminal charges pursuant to a plea agreement ratified by the trial court under which he was told he would receive a sentence of one to two years in prison. He was never informed by his attorney, the prosecutor or the court that in actuality his sentence would include a mandatory two-year parole term. After his release from prison, Baker was arrested as a parole violator and reincarcerated. The district court denied his petition for collateral relief. This Court reversed, holding that the mandatory parole term constituted a substantial addition to the one to two years imprisonment Baker was promised and that therefore he had been deprived of the benefit of his plea bargain in violation of the Due Process Clause. We ordered the parole term expunged and Baker released from custody, reasoning that since Baker had performed his part of the bargain, the state should be held to its promise.

Before turning to the applicability of *Baker* to the petitioners here, we address the State's threshold argument that *Baker* must be overruled in light of *United States v. Timmreck*, ... U.S. ....., 47 L.W. 4577. *Timmreck* involved a federal defendant who pleaded guilty on advice of counsel to a charge carrying a maximum penalty of 15 years in prison and a $25,000 fine plus a mandatory parole term of at least three years. In the Rule 11 (Fed. R. Crim. Pro.) proceeding, the district court judge properly advised defendant of the maximum prison term and fine but failed to inform him of the mandatory parole term. The judge accepted Timmreck's guilty plea and in a later proceeding sentenced him to ten years in prison plus a parole term of five years and a fine of $5,000. Timmreck neither objected to the sentence at the time it was pronounced nor appealed his conviction, but later moved to vacate the sentence on the ground that the trial judge had violated Rule 11 by

accepting the plea without admonishing him of the mandatory parole term. The Supreme Court, reversing the Sixth Circuit, held that a technical violation of Rule 11 resulting in no prejudice to the defendant and which could have been raised on direct appeal will not support collateral relief. In so doing, the Court expressly declined to decide whether collateral relief "would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances." 47 L.W. at 4579. Cf. *Hill v. United States*, 368 U.S. 424.

We think it plain from the foregoing summaries that the holding in *Baker* is in no way inconsistent with that of *Timmreck*. Unlike *Timmreck*, *Baker* involved not merely a technical violation of proper procedure but a complete failure to inform the defendant at any time that he would in fact be in the custody of the state for a period of three to four years (including parole) rather than the one to two years he had been promised. Moreover, unlike Timmreck, whose combined prison and parole terms were within the maximum penalty he had been warned he could receive and who had never been promised less than the maximum, Baker was prejudiced in that he received a sentence calling for two years of custody (on parole) more than he had bargained for. In short, the two cases are not only not "on all fours" as the State acknowledges, but wholly different. We therefore find no cause to reexamine the decision in *Baker*.

III

The State's first alternative argument is that even if *Baker* is still good law, it is not applicable on its facts to the guilty plea of petitioner Southall or the second guilty plea of petitioner Emanuel Williams.[4] With respect to Southall, the State contends that since he had bargained for as much as three years in prison and actually served

[4] The State concedes that Lawrence Williams' case is factually indistinguishable from *Baker* (Br. at 22). As noted, *supra* note 3, the State does not challenge the factual applicability of *Baker* to Emanuel Williams' guilty plea of July 31, 1974.

only 23 months, his case falls outside *Baker* and within *Bachner v. United States*, 517 F.2d 589 (7th Cir. 1975).

In *Bachner*, we held that the failure to inform a defendant of a mandatory parole term was not an error of constitutional magnitude where the sentence imposed did not exceed the maximum sentence the defendant was informed he would receive. What distinguishes *Bachner* from *Baker* is, first, that there was no plea agreement so that the defendant had no basis for expecting anything less than the maximum statutory sentence when he pleaded guilty and, second, that the sentence imposed including the mandatory parole term was within the maximum penalty defendant had been warned he could receive. Therefore, the defendant in *Bachner* was not prejudiced or deprived of the benefit of his plea bargain by the judge's failure to advise him of the mandatory parole term.

Southall's case is like *Baker*, not *Bachner*, in that Southall received a total sentence, including the three-year parole term, that exceeded the sentence he had bargained for and was promised. The State in effect asks us to ignore the additional parole term because Southall was actually incarcerated for less than the maximum three years of his negotiated plea. But, as we stated in *Baker*, "the conditions of parole place a number of onerous burdens on the liberty of paroled individuals," including the possibility of being returned to prison for technical parole violations. 551 F.2d at 184. While it is true that the defendant in *Baker* ended up spending 32 months in prison on a promised maximum sentence of two years imprisonment, it was the parole term itself with its concomitant burdens that we found to be a substantial addition to the negotiated sentence and not the additional time in prison resulting from the parole violation. In other words, a defendant does not have to violate his mandatory parole term and be reincarcerated for a total period in excess of the maximum negotiated sentence before he can object under *Baker* that the sentence imposed differed substantially from that which he was promised as an inducement to plead guilty. See *United States* ex rel. *Ferris v. Finkbeiner*, 551 F.2d 187 (7th Cir. 1977).

No. 80-1296

With respect to Emanuel Williams' guilty plea of August 2, 1974, the State argues that *Bachner* is controlling because the trial court was not a party to any plea agreement. We agree. Although the trial judge at the time of sentencing accepted the prosecution's recommendation for a sentence of one to three years imprisonment "as per agreement" (Pets. Br., App. B, at 8), the agreement referred to was one between Williams' attorney and the prosecutor only. Because the trial judge neither participated in nor ratified the agreement prior to accepting Williams' plea, it was not binding on the court. Moreover, the judge explicitly so warned the defendant:

> THE COURT: Mr. Orange, also known as Mr. Williams, although an agreement as to the penalty has been reached between your attorney and the State's Attorney, the Court is not bound to accept those terms; I could impose a lesser or a greater penalty in this case. Do you understand this?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Knowing that, do you still wish to plead guilty?
>
> DEFENDANT: Yes. (Pets. Br., App. B, at 7-8).

Thus like the defendant in *Bachner* and unlike the defendant in *Baker*, Emanuel Williams had no basis for expecting anything less than the statutory maximum. He was warned of this maximum, including the mandatory parole term. Judge Marshall found this warning insufficient for the purposes of informing Williams that a mandatory parole term would be part of the plea he had negotiated with the prosecutor because it was made in the context of the maximum sentence Williams could get under the law. Whether this finding was correct or, as the State contends, erroneous, we need not decide because there was no plea agreement binding on the court. Because the sentence imposed including the mandatory parole term was far less than the maximum period of imprisonment Williams was warned he could receive, he would not have been prejudiced even if the judge had failed to mention the parole term altogether.

Indeed, that would be the *Bachner* case. Accordingly, we reverse the order with respect to Emanuel Williams' guilty plea of August 2, 1974.

IV

With respect to petitioners Southall and Lawrence Williams, the State's alternative position is that *Baker* established a new and unexpected rule of law entitled only to prospective application and was therefore erroneously applied here to guilty pleas entered prior to March 17, 1977, the date *Baker* was decided. The State raised this issue for the first time on a Motion to Reconsider in *Williams I*. Judge Marshall rejected the argument on the grounds that *Baker* did not create a new and unexpected rule of law and that even if it had it would be entitled to retroactive application under the balancing test set forth in *Stovall v. Denno*, 388 U.S. 293. See 447 F. Supp. at 105-108. We agree with both the reasoning and conclusion of Judge Marshall's thorough opinion on this issue and therefore adopt it as our own.

The judgment is reversed with respect to the August 2, 1974, guilty plea of petitioner Emanuel Williams and in all other respects affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit